

**ARTICLE 1904 BINATIONAL PANEL REVIEW  
PURSUANT TO THE  
NORTH AMERICAN FREE TRADE AGREEMENT**

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**IN THE MATTER OF:**

**CARBON AND CERTAIN ALLOY STEEL )  
WIRE ROD FROM CANADA; FINAL )  
INJURY DETERMINATION (NOV. 1, 2002 )**

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Secretariat File No.

USA-CDA-2002-1904-09

**PANEL\*:**

James R. Holbein, Chairman  
Serge Anissimoff  
Kevin C. Kennedy  
David J. Mullan  
Robert E. Ruggeri

**DECISION OF THE PANEL**

**COUNSEL:**

For Ivaco Inc. and Ivaco Rolling Mills Inc.: Hunton & Williams (William Silverman, Esq. and Richard P. Ferrin, Esq.)

For Domestic Industry Interested Parties: Collier Shannon Scott (Paul C. Rosenthal, Esq., Kathleen W. Cannon, Esq., and R. Alan Lubberda, Esq.)

For the Investigating Authority: U.S. International Trade Commission, Office of the General Counsel (Karen Driscoll, Esq.)

\* The Panelists wish to express their appreciation for the support received from Panelist Assistant Harj Mann, Esq.

## I. INTRODUCTION

This Panel has been constituted pursuant to Article 1904(2) of the North American Free Trade Agreement (“NAFTA”). The Panel was appointed to review the final injury determination issued by the U.S. International Trade Commission (the “ITC” or “Commission”) in Carbon and Certain Alloy Steel Wire Rod from Canada.<sup>1</sup>

On November 27, 2002, Ivaco Inc. and Ivaco Rolling Mills Inc., (“Ivaco”) a Canadian producer, exporter, and U.S. importer of the subject merchandise, filed a Request for Panel Review of that determination.

In its Complaint, filed on December 19, 2002, Ivaco asserted the following:

The ITC erroneously refused to collect foreign producer, U.S. producer and importer, and purchaser data for the most recent quarter then available – the second quarter of 2002;

The ITC rejected as untimely certain second quarter 2002 U.S. producer financial information which had been submitted by Ivaco;

The ITC erroneously discounted “due to the pendency of these investigations” the weight given to interim first quarter 2002;

The ITC erroneously cumulated imports from Canada with those from Brazil, Indonesia, Mexico, Moldova, Ukraine, and Trinidad and Tobago;

The ITC erroneously found that (i) the volume of imports and the increase in that volume, and (ii) price underselling were “significant”;

The ITC erroneously determined that cumulated subject imports “had significant price suppressing effects”; and

The ITC erroneously found that the “subject imports are having a significant adverse impact on the domestic industry.”<sup>2</sup>

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<sup>1</sup> Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, 67 Fed. Reg. 66,662 (Int’l. Trade Comm’n. 2002). The ITC’s views were published in Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine Inv. Nos. 701-TA-417-421 and 731-TA-953, 954, 956-59, 961, and 962 (Final) USITC Pub. 3546 (October 2002).

<sup>2</sup> Complaint of Ivaco, 5-8 (December 19, 2002).

For the reasons more fully set forth below, and on the basis of the administrative record, the applicable law, the written submissions of the participants and the Panel hearing held in Washington, D.C. on May 14, 2004, the Panel remands the ITC's Final Determination.

## **II. BACKGROUND**

On August 31, 2002, U.S producers of carbon and certain alloy steel wire rod filed a Petition with the ITC and the Department of Commerce alleging that they were being materially injured by reason of the imports.<sup>3</sup>

The ITC published a preliminary determination that there was “a reasonable indication” that the U.S. industry was being injured by reason of the subject imports from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, Turkey, and Ukraine.<sup>4</sup>

The Commerce Department then found that imports from Canada were subsidized and being sold in the United States at less than fair value.<sup>5</sup>

On October 3, 2002, the ITC determined that the subsidized imports from Brazil and Canada, and less than fair value imports from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine were materially injuring the domestic industry.<sup>6</sup>

The Commerce Department then issued countervailing duty orders on the subject imports from Canada and Brazil, and antidumping orders on the subject imports from Canada, Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine.<sup>7</sup>

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<sup>3</sup> Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela, 66 Fed. Reg. 47,036 (2001). The U.S. Petitioners were Co-Steel Raritan, Inc; GS Industries, Inc.; Keystone Consolidated Industries, Inc.; and North Star Steel Texas, Inc.

<sup>4</sup> The ITC also determined that the subject imports from Egypt, South Africa, and Venezuela were negligible and terminated the investigations with regard to them. 66 Fed. Reg. 54,539 (2001).

<sup>5</sup> Commerce also determined that the subject imports from Brazil and Germany were subsidized and that those from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine were being sold at less than fair value.

<sup>6</sup> Commission Final Determination, *supra*, note 1.

<sup>7</sup> Antidumping duty order on wire rod from Canada, 67 Fed. Reg. 65944 (Oct. 29, 2002); countervailing duty orders on wire rod from Brazil and Canada, 67 Fed. Reg. 65871 (Oct. 22, 2002); antidumping duty orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago and Ukraine, 67 Fed. Reg. 65945 (Oct. 29, 2002).

### III. STANDARD OF REVIEW

All parties agree that the applicable standard of review is specified by NAFTA Articles 1904(2)–(3) and Annex 1911 of the NAFTA. Chapter 19 review Panels are directed by Article 1904(3) to apply:

the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

These provisions therefore require that a Chapter 19 Panel apply the standard of review and "general legal principles" which a federal court in the United States would otherwise apply in reviewing an ITC injury determination.<sup>8</sup>

Annex 1911 defines the standard of review to be applied in a Panel review as "the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended." Section 516A(b)(1)(B), in turn, defines that standard of review as:

The court shall hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

19 U.S.C. §1516a(b)(1)(B). Accordingly, the standard of review for the instant proceeding includes the "substantial evidence" test as set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. §1516a(b)(1)(B)). The Panel must, therefore, affirm the ITC's Final Determination "unless we conclude that the . . . determination is not supported by substantial evidence or is otherwise not in accordance with law." *PPG Industries, Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992).

The U.S. Supreme Court has interpreted "substantial evidence" as follows:

Substantial evidence is more than a mere scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a

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<sup>8</sup> Annex 1911 defines such "general legal principles" as, for example, "standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

conclusion,"...and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from is one of fact for the jury.<sup>9</sup>

The Court of Appeals for the Federal Circuit has applied the same interpretation of "substantial evidence" in reviewing international trade determinations.<sup>10</sup>

Furthermore, substantial evidence constitutes "something less than the weight of the evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. at 619-20 (1966). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Electric Industrial Co., Ltd. v. United States*, 750 F.2d at 933 (Fed. Cir. 1984) (quoting *Consolo v. Federal Maritime Commission*, 383 U.S. at 619-20); *PPG Industries, Inc. v. United States*, 978 F.2d at 1237 (Fed. Cir. 1992).<sup>11</sup>

It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Koyo Seiko Co., Ltd. v. United States*, 810 F. Supp. 1287, 1289 (Ct. Int'l Trade 1993) (quoting *Timken Co. v. United States*, 699 F.Supp. 300, 306 (1988)), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990); *Can-Am Corp. v. United States*, 664 F.Supp. 1444, 1450 (Ct. Int'l Trade 1987).

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<sup>9</sup> *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). See also *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

<sup>10</sup> See, e.g., *Matsushita Electric Industrial Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).  
The U.S. Court of International Trade employs this definition as well. See, e.g., *Koyo Seiko Co., Ltd. v. United States*, 810 F. Supp. 1287, 1289 (Ct. Int'l Trade 1993); *Tianjin Machinery Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1013 (Ct. Int'l Trade 1992); *Tehnoimportexport, UCF America Inc. v. United States*, 783 F. Supp. 1401, 1404 (Ct. Int'l Trade 1992); *Minebea Co., Ltd. v. United States*, 782 F. Supp. 117, 119 (Ct. Int'l Trade 1992), *aff'd*, 984 F.2d 1178 (Fed. Cir. 1993); *Armco, Inc. v. United States*, 733 F. Supp. 1514, 1518 (Ct. Int'l Trade 1990).

<sup>11</sup> See also *Zenith Electronics Corp. v. United States*, 812 F. Supp. 228, 231 (Ct. Int'l Trade 1993); *Minebea Co. Ltd. v. United States*, 782 F. Supp. at 119 (Ct. Int'l Trade 1992); *Torrington Co. v. United States*, 745 F. Supp. 718, 723 (Ct. Int'l Trade 1990), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991); *American Spring Wire Co. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

Panel review of a final injury determination is to be conducted "upon the administrative record." Article 1904(2).<sup>12</sup> Therefore, the Panel is not to review the agency determination *de novo*. *Cabot Corp. v. United States*, 694 F. Supp. 949, 952-53 (Ct. Int'l Trade 1988); *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *Luciano Pisoni Fabbrica Accessori v. United States*, 640 F. Supp. 255, 256 (Ct. Int'l Trade 1986).

The requirement that a review be "on the record" means that a Panel's review must be limited to only "information presented to or obtained by [the ITC]...during the course of an administrative proceeding...." 19 U.S.C. §1516a(b)(2)(A)(i). Consideration of information which was not presented to, or obtained by, the ITC during the course of an investigation would be beyond the jurisdiction of this Panel.

Neither the Court of Appeals for the Federal Circuit nor the Court of International Trade ("CIT") "may ... substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *Tehnoimportexport, UCF America Inc. v. United States*, 783 F. Supp. 1401, 1404 (Ct. Int'l Trade 1992) (quoting *Universal Camera Co. v. NLRB*, 340 U.S. 474, 488 (1951)); *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985). Accordingly, this Panel is similarly constrained.

This deference to the agency is not without limits. As the CIT has held:

[T]he substantial evidence standard requires courts generally to defer to the methods and findings of an agency's investigation .... [T]he Court must not permit an agency in the exercise of that discretion to ignore or frustrate the intent of Congress as expressed in substantive legislation that the agency is charged with administering...Were the

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<sup>12</sup> Section 516A(b)(1)(B) of the Tariff Act of 1930 as amended, 19 U.S.C. §1516a(b)(1)(B), similarly limits the Panel's review to information placed on the record during the administrative proceeding.

scope of the discretion accorded to the agency unlimited, there would be no point in the (statutorily mandated) judicial review here undertaken.

*Armco, Inc. v. United States*, 733 F. Supp. 1514, 1519 (Ct. Int'l Trade 1990) (citations omitted);

*Cabot Corp. v. United States*, 694 F. Supp. 949, 953 (Ct. Int'l Trade 1988) (and cases cited therein).

The other element of the standard of review (whether the determination is "in accordance with law")<sup>13</sup> applies to questions of statutory interpretation by the agency. Section 516A(b)(1)(B) of the Tariff Act of 1930, *as amended*, 19 U.S.C.A. §1516a(b)(1)(B).

In determining whether the ITC's interpretation of the statute is "in accordance with law", the Panel is to afford deference to the agency's reasonable interpretation of the statute which it administers. "The Supreme Court has instructed that the courts must defer to an agency's interpretation of the statute an agency has been charged with administering provided its interpretation is a reasonable one." *PPG Industries, Inc. v. United States*, 928 F.2d 1568, 1571 (Fed. Cir. 1991).<sup>14</sup> *See also Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51 (1978); *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986); *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986); *Consumer Product Division, SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985); *Smith Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).<sup>15</sup> This deference extends to the administering authority's interpretation of its own regulations as well.<sup>16</sup>

In accordance with this principle of administrative law, the ITC has been granted great discretion in administering the antidumping and countervailing duty laws. "Given these

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<sup>13</sup> NAFTA Article 1904(2) states that the "law" to be considered shall consist of "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials." Decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit are binding on this Panel.

<sup>14</sup> The Federal Circuit cited in support *Chevron. U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *K Mart v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

<sup>15</sup> The Court of International Trade has often applied this principle. *See, e.g., Tianjin Machinery Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1013 (Ct. Int'l Trade 1992); *PPG Industries, Inc. v. United States*, 712 F. Supp. 195, 197-98 (Ct. Int'l Trade 1989), *aff'd*, 978 F.2d 1232 (Fed. Cir. 1992); *Cabot Corp. v. United States*, 694 F. Supp. 949, 953 (Ct. Int'l Trade 1988).

<sup>16</sup> "Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of those laws and regulations." *PPG Industries, Inc. v. United States*, 712 F. Supp. at 198 (Ct. Int'l Trade 1989), *aff'd*, 978 F.2d 1232 (Fed. Cir. 1992).

circumstances, appellant's burden on appeal is a difficult one, for it must convince us that the interpretation ... [of the agency] is effectively precluded by the statute." *PPG Industries, Inc. v. United States*, 928 F.2d at 1571 (Fed. Cir. 1991).<sup>17</sup>

Nonetheless, this discretion and deference is not unfettered. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Saudi Iron & Steel Co. (Hadeed) v. United States*, 675 F. Supp. 1362, 1365 (Ct. Int'l Trade 1987).

It is a vital and time-honored principle of U.S. administrative law that an agency's ruling in an adjudicative proceeding be supported by reasoned decision making, with the various connections among the agency's fact findings, its reasoning process, and its conclusion being sufficiently clear. As the U.S. Supreme Court observed in *Securities & Exchange Comm'n v. Chenery Corp.*:

If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

332 U.S. 194, 196-97 (1947) (quoting *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935)). The Supreme Court has underscored this point in subsequent cases. See *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . .") *Accord Elec. Consumers Res. Council v. F.E.R.C.*, 747 F.2d 1511, 1513 (D.C. Cir 1984); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001); *Rhodia*

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<sup>17</sup> Prior to the passage of the Trade Agreements Act of 1979, the Treasury Department, which administered the antidumping law, also enjoyed such discretion. *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1216 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978).

*Inc. v. United States*, 185 F. Supp. 2d 1343 (Ct. Int'l Trade 2001); *A. Hirsh, Inc. v. United States*, 729 F. Supp. 1360, 1362 (Ct. Int'l Trade 1990). In short, an agency's reasoning process must be transparent before a reviewing body can be asked to review an agency decision. An agency's failure to meet this standard of reasoned decision making deprives the parties of their opportunity for a fair and transparent proceeding and makes impossible the task of the reviewing authority.

#### **IV. OPINION**

##### **A. The Request for Second Quarter 2002 Data**

###### **1. Factual Background**

After the ITA issued its preliminary dumping determination, on May 2, 2002, the ITC issued deadlines in the final phase of its injury investigation, including the submission of completed questionnaires to the Commission by May 14, 2002.<sup>18</sup> Those questionnaires requested the parties to provide quarterly data through the first quarter of 2002.

Subsequently, the ITA postponed its final determinations in the dumping investigations from June 17 to August 23, 2002. Accordingly, effective May 15, 2002, the ITC revised its schedule to conform to the ITA's new schedule.<sup>19</sup> The ITC's new schedule included the following deadlines:

- August 14 for the staff prehearing report;
- August 21 for filing of prehearing briefs;
- August 27 for the hearing; and

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<sup>18</sup> Other deadlines set were June 12 for the prehearing staff report; June 19 for prehearing briefs; the hearing was set for June 25, and posthearing briefs were due July 2, 2002. Final comments were due on July 23, 2002. 67 Fed. Reg. 22105 (May 2, 2002).

<sup>19</sup> 67 Fed. Reg. 36022, 36022 (May 22, 2002). The ITC had already set its schedule based on the earliest ITA final determination in its investigations. The ITA then aligned its countervailing duty determinations with its antidumping determinations and subsequently extended the dates of the final dumping determinations.

- September 4, 2002 for posthearing briefs.<sup>20</sup>

On June 19, 2002, Ivaco and other respondents requested the ITC to collect *second* quarter 2002 data.<sup>21</sup> Ivaco based its request on, *inter alia*, the end of the 2001 recession and the effects of the Section 201 safeguard duties program on steel wire rod. Several weeks later, on August 1, 2002 Ivaco repeated the request.<sup>22</sup> The ITC did not issue questionnaires for the second quarter data and Ivaco mentioned the request again in its Posthearing Brief on September 5, 2002.<sup>23</sup> On September 23, 2002, Ivaco, along with other respondents, made another request to the ITC that the second quarter data be collected.<sup>24</sup> Finally, Ivaco repeated the request to collect data yet again in its Final Comments.<sup>25</sup> The ITC never collected the second quarter data nor did it respond to the multiple requests by Ivaco and the other respondents.

## **2. Analysis of Injury in the Present Tense**

Ivaco contends that the ITC's decision not to collect the more current second quarter data was arbitrary and capricious because, among other things, the ITC was required to determine injury "in the present tense". This, the Panel is not prepared to accept.

Title VII is silent with regard to the time frame covered by the ITC's period of investigation. Ivaco notes that the statute refers to whether a domestic industry "*is* materially injured" as a basis for requiring the most current data to determine injury in the present tense.<sup>26</sup> The Panel is not convinced that the statutory language in question constitutes such a requirement. The CIT in *Kenda*

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<sup>20</sup> *Id.*

<sup>21</sup> Letter from Christopher Stokes to Secretary Abbott (June 19, 2002).

<sup>22</sup> Letter from William Silverman to Secretary Abbott (August 1, 2002).

<sup>23</sup> Ivaco Posthearing Brief at 8, (September 5, 2002).

<sup>24</sup> Letter from William Silverman to Secretary Abbott (September 23, 2002)

<sup>25</sup> Ivaco Final Comments at 3, (September 30, 2002).

<sup>26</sup> The statute states: "The Commission shall make a final determination of whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section."

*Rubber* reached the same conclusion that “the present tense wording of the statute” did not require the ITC to look at the “present period”.<sup>27</sup>

Rather, it is well settled that the silence of the statute in this regard reflects the considerable discretion enjoyed by the ITC to determine the period of investigation. *See, e.g., America Spring Wire Corp. v. United States*, 8 CIT 20, 26, 590 F. Supp. 1273, 1279 (1984), *aff’d sub nom Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985) (“But the ITC is not required by statute to use any particular time frame for its analysis, although it generally focuses on annual time periods....This is hardly a mandate for quarterly analysis on demand of petitioners”). In that case the CIT affirmed the ITC’s use of annual data, and refused to require the ITC to use *any* quarterly data at all.<sup>28</sup>

Ivaco relies on the CIT’s decisions in *Usinor v. United States*, Ct. No. 01-00010, Slip Op. 02-70 (Ct. Int’l. Trade, July 19, 2002), and *Chr. Bjelland Seafoods A/C v. United States*, 19 CIT 35 (1992) (*Norwegian Salmon II*), for its claim that the ITC is required to obtain the most recent data available up to the Commission’s vote day. However, both cases are distinguishable from the instant case because neither involved adding data to the agency record, as Ivaco seeks to do here. Rather, the relevant issue in both cases was not whether the ITC was required to extend its period of investigation but rather whether to consider certain data already part of the record before it.

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<sup>27</sup> *Kenda Rubber Industrial Co., Ltd. v. United States*, 630 F. Supp. 354, 359 (Ct. Int’l Trade 1986) (“Plaintiffs argue that the statute requires the Commission to look at the present period because of the present tense wording of the statute. Although the relevant section is cast in the present tense, the Court does not find this argument compelling.”) *Compare Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1104 (Fed. Cir. 1990) where the Federal Circuit generally noted that “the injury requirement mandates a determination of whether an industry suffers present material injury.” The court relied, in part, on the fact that “[t]he statute is written entirely in the present tense.” However, the question in *Chapparal*, a cumulation case, was whether the ITC was reasonable in excluding certain imports from cumulation based on their status “as of vote day.” *Id.* at 1105. The issue of extending the period of investigation, or adding data to the record, was not before the court.

<sup>28</sup> *See also British Steel Corp. v. United States*, 8 CIT 86, F. Supp. 405, 411 (1984); *Steel Authority of India, Ltd. v. United States*, 146 F. Supp. 2d 900, 906 (2001) (“This court has consistently held that the Commission has broad discretion in choosing the time frame for its investigation and analysis.”); *Kenda Rubber Industrial Co. v. United States*, 10 CIT 120, 126-27, 630 F. Supp. 354, 359 (1986).

In the first *Norwegian Salmon* case,<sup>29</sup> the CIT held that the “Commission’s charge is to determine whether subject imports are causing ‘present’ injury to the domestic industry.” The court held that the ITC had improperly based a determination of “present” material injury in March 1991 on the “lingering effects” of past injury which had occurred in 1989. The ITC had placed “great emphasis” on data for 1987 through 1989 and given “less weight” to data from 1990 and 1991 when the petition was filed and provisional duties imposed.

On remand the ITC declined to give the post-June 1990 data “any probative value.” In *Norwegian Salmon II*, the CIT again reversed, stating that the “subsequent record evidence left unaddressed by the ITC plurality simply refutes all inferences that subject imports are a ‘present’ cause of [injury].... In other words the ITC may not base an affirmative finding of present material injury solely upon early record evidence that imports cause injury where, as here, the most recent reliable *record* evidence demonstrates that, due to changed circumstances, subject imports are no longer a cause of such injury.” *Chr. Bjelland Seafoods A/C v. United States*, 19 CIT 35, 43, 44, 47 (1992) (emphasis added).

Therefore, in the *Salmon* cases the issue was whether – and to what extent - the ITC should have considered and weighed evidence already on the record, not whether it should have admitted such evidence on the record.

In *Usinor* the issue was also not whether the ITC was required to collect or admit certain data to the record, but whether it should address “materially relevant evidence properly in the record” which had already been collected. *Usinor v. United States*, Ct. No. 01-00010, Slip Op. 02-70 at 20 (Ct. Int’l. Trade, July 19, 2002). The ITC had wanted to limit its review of capacity utilization figures to 1997 through March 2000. The respondents wanted the ITC to consider data from the last three quarters of 2000 which were already in the record. The court noted that “[t]he

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<sup>29</sup> *Chr. Bjelland Seafoods A/C v. United States*, 16 CIT 945, 954 (1992).

Commission must address record evidence of significant circumstances and events that occur between the petition date and the vote day...A discernable impact determination in this case can only be made if the materially relevant evidence properly in the record is addressed.” *Id.* Therefore, the situation is distinguishable from the case at bar where Ivaco seeks to have certain data added to the agency record.

The CIT discussed at some length in *Norwegian Salmon II* the limits of the ITC’s obligation to focus on the most contemporaneous data to vote day. “[T]he ITC is required to account for reliable record evidence of changed circumstances which occur between the date of the petition and vote day and which impact a present material injury inquiry.” Having said that, the court went on to observe that: i) “[T]he ITC is not required to collect and examine data up until vote day...without considering whether the reliability of such data is suspect”; and ii) the ITC is not “required to base its determination of present material injury upon inferences about a period most nearly contemporaneous with vote day, during which time data cannot, as a practical matter, be collected.” *Id.* at 43 n.22.

The court made it clear that “the entirety of the record must be evaluated”, but that *within that record* the ITC is required to address the data which is most contemporaneous to vote day as possible provided it is reliable. The ITC still has the discretion to choose the most appropriate time frame for the period of investigation. “The court merely observes that, within the time frame established by the ITC for its investigation, relatively older information serves to provide a historical frame of reference against which a ‘present’ (*i.e.*, as recent to vote day as possible, given the limitations of the collected data) material injury determination is to be made.” *Id.*

The CIT revisited the issue in *Saarstahl AG v. United States*, 858 F. Supp. 196, 200 (CIT 1994), and held that the *Norwegian Salmon* decision does not “mandate” the ITC to base its injury determination on the domestic industry’s condition “as of vote day”. Instead “the Court interprets

*Norwegian Salmon* to advocate the use of information concerning the domestic industry in as contemporaneous a time frame as possible. The quest for up-to-date information, however, should not be at the expense of overlooking the ‘possibility that negative effects of a present injury are latent’. It is for this reason, the Court normally defers to the Commission’s discretion in choosing the most appropriate period of time for its investigation.” *Id.* at 200 (citations omitted).

Considering all this, the Panel cannot conclude that the ITC abused its discretion in setting the period of investigation. Setting the period of investigation is clearly within the exercise of the ITC’s discretion. The Panel has also not been shown, nor has it found any legal precedent where the ITC was required by a reviewing court to expand its period of investigation or generate new data on the record. While the Commission does, indeed, have the authority and discretion to reopen the administrative record in response to a remand determination,<sup>30</sup> that is not the issue at this stage of the proceeding.

### **3. Reasoned Justification Required**

The Commission's discretion to set the period of investigation, however, is to be distinguished from its legal obligation to respond with reasoned justification to requests that raise issues material to the investigation. Ivaco has argued that the Commission failed to provide such a reasoned response to its repeated requests to expand the period and administer questionnaires for second quarter 2002. The record indeed indicates that Ivaco (and other respondents) raised the issue of the second quarter 2002 questionnaires on four occasions during the investigation. The ITC did not respond to these requests during this investigation or provide an explanation on the record why the second quarter data were not being sought.

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<sup>30</sup> The Court of Appeals for the Federal Circuit has stated, “[w]hether on remand the Commission reopens the evidentiary record, while clearly within its authority, is of course solely for the Commission itself to determine.” *Nippon Steel Corp. v. International Trade Commission*, 345 F.3d 1379, 1382 (Fed. Cir. 2003).

To the extent that Ivaco refers to evidence and makes relevant arguments concerning volume, price effects and impact of the imports, 19 U.S.C. § 1677f(i)(3)(B) imposes a requirement on the Commission to “explain” the basis for its decision in the face of arguments made by Ivaco to the contrary. This conclusion is buttressed by the legislative history of 19 U.S.C. § 1677f(i)(3)(B), which provides in pertinent part:

Existing law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency’s determination be discussed so that the ‘path of the agency may be reasonably discerned’ by a reviewing court.

Uruguay Round Trade Agreements, Statement of Administrative Action, H.R. Doc. No. 316, vol. 1, 103d Cong., 2d Sess. 892 (1994)(“SAA”), *See Taiwan Semiconductor Indus. Assoc. v. United States*, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (“the Commission need not isolate the injury caused by unfair imports... but must examine other factors to ensure that it is not attributing injury from other sources to the subject imports.”).<sup>31</sup>

The ITC suggests, for the first time in its brief before this Panel and at the hearing, that expanding the period of investigation would have been administratively difficult, given the number of parties to contact and the data to be compiled and analyzed. Counsel for the ITC also suggests that it did not have sufficient time to collect and process the data sought by Ivaco and conduct the likely follow-up.<sup>32</sup>

It may be that the Commission’s decision not to collect data for Q2 2002 was within the exercise of its sound discretion. Nevertheless, since the Commission did not respond to or address Ivaco’s requests on the record, the Commission’s reasoning process in support of its

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<sup>31</sup> Commission Brief at 28.

<sup>32</sup> Brief of the Investigating Authority 32-33. (May 30, 2003).

decision not to collect Q2 2002 data lacks transparency and requires further explication. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962) (“The courts may not accept appellate counsel’s *post hoc* rationalizations for agency action; *Chenery* requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . .”) *Accord Elec. Consumers Res. Council v. F.E.R.C.*, 747 F.2d 1511, 1513 (D.C. Cir 1984); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001)(“we generally decline to consider the agency's new justification for the agency action”); *Rhodia Inc. v. United States*, 185 F. Supp. 2d 1343 (Ct. Int'l Trade 2001) (“Although Commerce's brief addresses in greater detail the reasons that integrated producers have higher overhead costs, the 'post hoc rationalizations' of counsel [cannot] supplement or supplant the rationale or reasoning of the agency.”); *A. Hirsh, Inc. v. United States*, 729 F. Supp. 1360, 1362 (Ct. Int'l Trade 1990) (“although ITC is allowed wide latitude in its decision-making in this area, it is not exempt from articulating its reasoning”).

An agency’s failure to meet this standard of reasoned decision making deprives the parties of their opportunity for a fair and transparent proceeding and makes impossible the task of the reviewing authority. Without the benefit of the Commission’s adequately spelled-out views on the issue, complainant cannot have had its “day in court”, as required by *Chenery* and similar cases. The Panel finds that the Commission’s failure to state its position on the second quarter 2002 data collection in the course of its decision making was arbitrary, capricious, and not in accordance with law. The Panel remands this issue to the Commission for it to provide its reasoning as to why it did not collect second quarter 2002 data, as requested by the complainant.

## **B. Discounting the Weight of First Quarter 2002 Data**

### **1. Introduction**

Ivaco claims that the Commission erroneously decided to discount the weight of first quarter 2002 data due to the pendency of the investigation. In considering whether the change in data is related to the pendency of the investigation, the Commission may simply presume the fact upon finding “a significant change”.<sup>33</sup> To be sure, it may choose to not reduce the weight accorded to the data, but the discretion is there.

The statutory process of reaching the conclusion that the change in data is related to the pendency of the investigation is thus relatively straightforward. It relates solely to a finding by the Commission that there has been a significant change. The connection between a change in data and the pendency of the investigation may thereafter be presumed.

Importantly, the presumption is rebuttable by evidence establishing that the change is related to other factors. Ivaco argues that it presented sufficient evidence to rebut the presumption. The issue for this Panel is whether the Commission’s decision to discount first quarter 2002 (“Q1 data”) is supported by substantial evidence and in accordance with law.

### **2. The Legal Framework**

The starting point for analysis is the statute that authorizes the Commission to discount data. 19 U.S.C. § 1677(7)(I) provides as follows:

The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under Part I or Part II of this subtitle is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury, threat of material injury, or material retardation of the establishment of an industry in the United States.

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<sup>33</sup> We do not discuss the requirement that the “change in data” be “significant”. The Commission did not explicitly indicate in its Final Determination that the change in volume of subject imports was significant.

The SAA provides an explanation of the legislative intent behind 19 U.S.C. § 1677(7)(I) and modifies the condition precedent discussed above:

[W]hen the Commission finds evidence on the record of a significant change in data concerning the imports or their effects subsequent to the filing of the petition ... the Commission may presume that such change is related to the pendency of the investigation. In the absence of sufficient evidence rebutting that presumption and establishing that such change is related to factors other than pendency of the investigation, the Commission may reduce the weight to be accorded to the affected data.

SAA at. 853-54.

Also relevant in this context is 19 U.S.C. § 1677f(i)(3)(B) which provides the following:

[T]he Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.

As mentioned in Part IV A above, 19 U.S.C. § 1677f(i)(3)(B) imposes a requirement on the Commission to “explain” the basis for its decision to discount Q1 data in the face of evidence and “relevant” arguments presented by Ivaco to the contrary. The issue of whether to discount the Q1 data is clearly material in this case, given Ivaco’s arguments regarding the changes in volume, price effects and impact during 2002, and in the context of Ivaco’s other like submissions concerning its request to gather second quarter 2002 data discussed in the previous section. In our view it is clear that the Commission did not deal with the various submissions by Ivaco seeking to rebut the presumption. There is simply no analysis of Ivaco’s arguments and no assessment of whether they rise to the level of displacing the presumption in the Final Determination.

### **3. The Parties' Arguments and the Commission's Final Determination**

#### **a. Ivaco's Arguments**

Ivaco submits that it presented evidence and argument to the ITC that rebutted the presumption that the change in volume of subject imports in the first quarter of 2002 was related to the pendency of the investigation.<sup>34</sup> Its argument is that the improvement in the domestic industry was unrelated to the pendency of the investigation but rather related to other factors. This is obviously a most relevant and material issue since all parties agree that the domestic industry experienced improvement in the first quarter of 2002.<sup>35</sup>

In particular, Ivaco cites the following factors as rebutting the presumption:

- 1 The volume of subject imports remained steady after the filing of the petition, and did not decline until much later, due to the newly revised Section 201 TRQ under which the residual amounts of in-quota imports were allowed in January and February were no longer offset by the historical "spike" in volumes in March;
- 2 The condition of the domestic industry improved despite an increase in total imports during the quarter;
- 3 The domestic industry experienced increased profitability and productivity ratios due to restructuring and reductions in costs of production as well as other factors;
- 4 The effects of the recession from 2000 to 2001 and particularly effects of the "end of the recession";
- 5 The volume increases of subject imports over the period of the investigation related to markets that were abandoned by the domestic industry, who exited the market during the period of the investigation for reasons unrelated to the subject imports; and

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<sup>34</sup> Ivaco Brief at 29.

<sup>35</sup> The parties disagree as to the cause of the improvement in the domestic industry.

6 Domestic prices increased (three to six months) prior to the pendency of the investigation, based on evidence on the record.

There is in the record ample support for the proposition that Ivaco clearly raised and unambiguously advanced these arguments before the Commission. The following record references serve to illustrate:

- As specifically concerns volume, pages 57 through 60 of the Joint Respondents' Pre-Hearing Brief submitted that "[t]he Commission should not discount the significance of the current condition of the industry due to the filing of the petition".
- At page 57, the Joint Respondents' Pre-Hearing Brief argued that volume of subject imports increased rather than declined, citing evidence from the Staff Reports and urged the interpretation of 19 U.S.C. § 1677(7)(I) concerning "total imports" of the subject merchandise. Ivaco raises an important distinction between "imports of the subject merchandise" and "imports of the subject merchandise by subject producers".
- At pages 25, 32 and 50 through 58, the Joint Respondents' Pre-Hearing Brief further explained that the restructuring of the industry and changes to Section 201 TRQ in November of 2001, and not the pendency of the investigation, caused the decline in volume of imports in the first quarter of 2002 (as interpreted by the Commission). At page 20, the Joint Respondents' Pre-Hearing Brief further cites the effects of the Recession in 2000 and 2001.
- At pages 28 through 32, the Joint Respondents' Pre-Hearing Brief states that volume increases of subject imports over the period of the investigation related to markets that were abandoned by the domestic producers and that domestic

producers exited the market during the period of the investigation for reasons unrelated to the subject imports with reliance on specific evidence on the record.

- Pages 41 through 47, and Exhibit 14 of the Joint Respondents' Pre-Hearing Brief cited evidence on the record and argues that domestic prices increased before the filing of the petition and, therefore, prior to the pendency of the investigation.
- In its Post-Hearing Brief, at pages 8 through 10, Ivaco cited evidence on the record to rebut the presumption that the changes in data were caused by the pendency of the investigation, and further offered contrary explanations for the changes in volume, price effects and impact of the imports during the period of the investigation.
- In the Appendix to the Post-Hearing Brief, Ivaco also provided "Answers to the Commission's Questions". At Page A-8 of those answers, Ivaco responded to Commissioner Hillman's question regarding "the improvement of the domestic industry despite the impact of non-subject imports". Ivaco's answer cited evidence regarding a surge in volume imports from India, Belarus, and the Czech Republic and the resulting price effects and impact on the domestic producers.
- Ivaco's Exhibits 1 and 3 to the Post-Hearing Brief further provide graphical and chart representations of the evidence, which supports their alternative explanations for changes in volume, price effects and impact of imports during the pendency of the investigation.

b. The Commission's Final Determination

Without expressly addressing Ivaco's arguments, the Commission determined that a decrease in the volume of cumulated subject imports was caused by the pendency of the investigation. The Commission apparently exercised its discretion solely on this basis to reduce the weight given to the post-petition data or specifically first quarter data in the following terms:<sup>36</sup>

We have considered whether the volume of cumulated subject imports since the filing of the petition is related to the pendency of the investigations. We have determined that this is the case with respect to lower subject import volumes in interim 2002 as compared to interim 2001. Therefore we reduce the weight accorded to interim 2002 data for the purposes of our material injury determinations. Respondents have argued that we should focus our analysis on the current status of the industry, due to recent changes in the domestic industry. Joint Respondents' Pre-Hearing Brief at 49-51. We have considered the entire period examined in conducting our analysis consistent with our traditional practice, except as noted for interim 2002 data. (Commission's Opinion at Footnote 167, page 27 of "Views of the Commission" dated October 18, 2002)

\* \* \* \*

Because of the pendency of these investigations, and the drop in subject import volume in interim 2002, we find the data from the period 1999-2001 are more probative for our pricing analysis, and we have reduced the weight accorded to interim 2002. (Commission's Opinion at Footnote 177, page 28 of "Views of the Commission" dated October 18, 2002)

\* \* \* \*

As with volume and pricing sections, we have focused our analysis on calendar years 199 to 2001 data, and reduced the weight accorded to interim 2002 data due to the effect of the filing of the petition and the pendency of these investigations. (Commission's Opinion at Footnote 195, page 31 of "Views of the Commission" dated October 18, 2002)

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<sup>36</sup> There is no express analysis or discussion of Ivaco's arguments advanced to rebut the presumption that subject import volumes fell in response to the pending investigation.

c. The Commission's and Domestic Interested Parties' Arguments

Of necessity the ITC and the domestic interested parties responded competently and in detail to Ivaco's arguments by offering contrary *post hoc* analysis and reasons. Those submissions were intended on one the hand to undermine or contest the validity of Ivaco's arguments. On the other hand those submissions were intended to support the Commission's decision to discount by pointing to extracts from the Final Determination dealing with restructuring and recession, non-subject imports, pricing and improvement in the domestic industry, i.e. the very matters alleged by Ivaco to have been unaddressed by the Commission.

Without making any determination of fact, the Panel notes that the only relevant extract or portion of the Final Determination that deals with the Commission's decision to discount Q1 data is as set out above in Part IV.B.3.b hereof, at footnotes 167, 177 and 195 of the Commission's Final Determination .

Further, none of the references in the Final Determination cited by either the ITC or the domestic interested parties expressly refers to the decision to discount or reduce the weight of the Q1 data. Those cited references are relevant to and consistent with the Commission's determination in finding injury and not with respect to any decision to discount Q1 data.

In this regard, the Panel does not mean to criticize the parties in any way for their able argument and submissions. The point is that the ultimate burden to analyze and explain those issues lies with the Commission. The Panel is of the view that it is the Commission in the first instance that must address the validity of Ivaco's arguments. *Post hoc* rationalizations by counsel are no substitute for reasoned decision making by the agency charged with the responsibility for administering the law. In this very regard, the U.S. Supreme Court in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), admonished reviewing bodies not to accept *post hoc* rationalizations of counsel when reviewing administrative agency decisions:

The courts may not accept appellate counsel's post hoc rationalizations for agency action; [*Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . . For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate . . . the administrative process . . . .

As further noted by the U.S. Supreme Court in *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947):

[W]e emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

332 U.S. at 196. Finally, as observed by the Court of International Trade in this connection in *A.*

*Hirsh, Inc. v. United States*, 729 F. Supp. 1360 (Ct. Int'l Trade 1990):

It is by now established that any reviewable determination requires a reasoned basis. . . . [Citations omitted.] Failure of the decision-maker "to provide the court with the basis of its determination precludes the court from fulfilling its statutory obligation on review." *Industrial Fasteners Group v. United States*, 2 CIT 181, 190, 525 F.Supp. 885, 893 (1981), aff'd 710 F.2d 1576 (Fed.Cir.1983). Under this standard, although ITC is allowed wide latitude in its decision-making in this area, it is not exempt from articulating its reasoning. "Many choices of ITC involve 'discretionary' considerations, but the choices generally must be explained so that the reviewing court may discern the path of reasoning which led to the final outcome." *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 704 F.Supp. 1068, 1071 (1988). . . .

In the instant case ITC failed to articulate the reasons for its particular application of law; it merely recited uninformative statutory language. Without an articulation of reasons the court cannot ascertain whether or not ITC's decision was arbitrary, capricious, or otherwise not in accordance with law.

729 F. Supp. at 1362.

Similarly in the present case, without an articulation by the Commission of its reasons for rejecting Ivaco's evidence to rebut the presumption regarding the weight of post-petition data,

the Panel cannot determine whether the Commission's decision is arbitrary, capricious, or otherwise not in accordance with law. By way of a single example, the Panel's dilemma may be illustrated by a reference to the submissions concerning changes to the Section 201 TRQ quotas. Counsel for the ITC responds to Ivaco's arguments outlined above regarding the Section 201 TRQ at footnote 62, page 52 of its Brief as follows:

The only explanation offered by Ivaco together with other respondents to the Commission, as to why subject import volume dropped in interim 2002, was that they fell because of the advent of the wire rod Section 201 tariff-rate quota. ... This is illogical because that event was equally likely to affect interim 2001 volume data, which the Commission, consistent with its regular practice compared to 2002 data. Quota year one was March 1, 2000 through February 28, 2001. Quota year two was March 1, 2001 through February 28, 2002.

The problem faced by the Panel may now be illustrated: Firstly, nowhere in the Final Determination does the Commission expressly refer to Ivaco's argument regarding changes in the Section 201 TRQ.

Secondly, this *post hoc* explanation does not address the effect of the *change* in the Section 201 TRQ, on November 21, 2001, which change was cited and explained in the Joint Respondent's Pre-Hearing Brief at pages 25, 32 to 34, 52 to 54 and 58 and would appear to explain why the historical "spike" in March would not have been present in 2002, but was present in 2001.

Thirdly, the ITC states that the change to the Section 201 TRQ is the "only factor cited by Ivaco to explain the drop in subject volume in interim 2002", which does not address the multiple arguments by Ivaco outlined above regarding price effects and impact which are also contrary to the Commission's presumption that the changes are a result of the pendency of the investigation.

It is the Panel's view that the Commission must explain the basis for its determination that the volume, price and impact changes were caused by the pendency of the investigation

when weighed against Ivaco's submissions to the contrary. The Commission is not absolved from the legal requirement to address the relevant arguments and evidence submitted by Ivaco, which seek to counter the presumption for each of volume, price effects and/or impact.

#### **4. Conclusion**

In conclusion, the Panel was presented with substantive arguments concerning the matters outlined *supra* concerning the supportability or otherwise of the ITC's decision to discount. Importantly Ivaco's arguments were made for the first time before the Commission. These arguments remain unaddressed on the record. Moreover, the record does not provide the required discussion of the issues "relevant to the agency's determination...so that the 'path of the agency may be reasonably discerned' by a reviewing court." SAA at 892. That discussion, not having been made by the ITC in its Final Determination, occurred in the form of the *post hoc* reasoning and argument advanced by ITC's counsel and the domestic interested parties' counsel before this Panel.

This Panel is of the view that the proper place to have Ivaco's material arguments determined is by the Commission and on the record. The Panel is not, otherwise, in a position to assess the correctness of any parties' views or make any finding of fact. It accordingly remands and instructs the ITC to address all of Ivaco's arguments intended to rebut the legal presumption that the change in subject import volumes was related to the pendency of the investigation.

**C. The Commission's Rejection of Information Pertaining to the Increased Profitability of Two of the Petitioners During the Second Quarter of 2002**

As a subset of its assertion that the Commission should have expanded its inquiry to include data for the second quarter of 2002, Ivaco contends that the Commission erred in rejecting as “untimely” documentation which Ivaco filed on September 24, 2002. This documentation consisted of a letter attaching SEC reports showing that two of the petitioners (Keystone and Co-Steel) had increased their profits during the second quarter of 2002. In contrast, the Commission did accept a further communication filed by Ivaco on September 25, 2002, that contained news media reports on the merger of one of the petitioners with a Brazilian respondent and the announcement by three of the petitioners of investment in new equipment. In terms of the case schedule, this filing came some twenty days after the deadline for the filing of post-hearing briefs (September 4), one day before the release of the final staff reports to the parties (September 25), and three days before final comments were due (September 27).

In its letter of September 27, 2002,<sup>37</sup> informing Ivaco that it was rejecting the filing of September 24, the Commission provided no reason other than that the filing was “untimely”. The only other reference to this matter is at page 3, note 2 of the Final Determination. There, the Commission refers to Commission Rule 207.68(b) which provides that final party comments “containing new factual information shall be disregarded.” 19 C.F.R. § 207.68(b). The Commission also cites 19 U.S.C. § 1677m(g), which in its last sentence contains an instruction to the same effect. Following this, the Commission simply goes on to state that, on September 27, 2002, it had rejected as untimely the material filed by Ivaco on September 24. The only inference that can be drawn from this is that the Commission was relying on the legislative provisions to which it referred.

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<sup>37</sup> Letter dated 9/27/02 to WH rejecting untimely filed quarterly reports, DL 184 (Public Record Online 200209270062).

To the extent that the new information was not in fact part of Ivaco's final comments but filed independently of and prior to the deadline for those comments, the legislative provisions relied upon by the Commission cannot sustain the rejection of the information. In their Briefs<sup>38</sup> and oral submissions, however, both the Commission and the domestic industry make a broader claim. It is their position that the overall scheme of the Rules makes it clear that there is no right to file new information beyond the time established for the submission of post-hearing briefs.

Once again, this is not a necessary or even a fair reading of the Rules. The full text of 19 U.S.C. § 1677m(g)<sup>39</sup> contemplates the continued gathering of information until a point prior to the provision of the opportunity to make final comments. It is also an argument that seems to be undercut by the advertised position of the Commission. Thus, the Commission's own Antidumping and Countervailing Duty Handbook, explaining the Rules ("Handbook"), not only allows for the submission of new information as part of the post-hearing briefs, but also describes a process whereby additional information may be filed in the light of the final staff report. It also refers to the "Commission clos[ing] the factual record (*i.e.* ceases to accept new factual information) approximately five days after the staff report is issued".<sup>40</sup> This flexibility with respect to the filing of new information is also evidenced by the Commission's acceptance of other information filed by Ivaco one day later on September 25, as well as the appearance of other new information on the record up until September 27, 2002.

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<sup>38</sup> See Brief of Domestic Industry Interested Parties in Opposition to Brief of Complainants, at 30-32 ("Domestic Industry Brief"); Brief of the Investigating Authority The U.S. International Trade Commission, at 38-40 ("Commission Brief").

<sup>39</sup> That subsection provides in full as follows:

Information that is submitted on a timely basis to the administering authority or the Commission during the course of a proceeding under this subtitle shall be subject to comment by other parties to the proceeding within such reasonable time as the administering authority or the Commission shall provide. The administering authority and the Commission, before making a final determination under section 1671d, 1673d, 1675, or 1675b of this title shall cease collecting information and shall provide the parties with a final opportunity to comment on the information obtained by the administering authority or the Commission (as the case may be) upon which the parties have not previously had an opportunity to comment. Comments containing new factual information shall be disregarded.

<sup>40</sup> U.S. Int'l Trade Comm'n, Antidumping and Countervailing Duty Handbook, at II-21, 22.

19 U.S.C. § 1677m contemplates the setting of deadlines for the filing of information. See, e.g., 19 U.S.C. § 1677m(e)-(i). In reality, neither in its Rules nor in the way in which it conducted this investigation has the Commission set explicit and firm deadlines for the submission of information. While 19 U.S.C. § 1677m(f) obliges the Commission to provide “a written explanation” for its rejection of information only “to the extent practicable”,<sup>41</sup> where the Commission does, as here, provide a reason for rejecting information, it must have some support in the law. To the extent that it is not obvious from the relevant legislation or the Rules that the September 24 filing by Ivaco was “untimely,” and to the extent that the information was not part of Ivaco’s final party comments and thus clearly untimely, there is no justification on the record for the rejection of the filing of September 24.<sup>42</sup>

Among their *post hoc* justifications of this rejection, the Commission advanced some rather different reasons for not accepting the September 24 information. For example, it was asserted that the information filed lacked relevance because it pertained to the second quarter of 2002,<sup>43</sup> and, secondly, it was assailed as not useful because it pertained to only two companies, and not the domestic industry as a whole.<sup>44</sup>

This Panel has already determined that it may not entertain such *post hoc* justifications and that is even more the case when they are different from the reasons contained in the record.

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<sup>41</sup> That subsection provides in full as follows:

If the administering authority or the Commission declines to accept into the record any information submitted in an investigation or review under this subtitle, it shall, to the extent practicable, provide to the person submitting the information a written explanation of the reasons for not accepting the information.

<sup>42</sup> The only case cited by the parties pertinent to this issue is *Cheflin Corp. v. United States*, 219 F. Supp. 2d 1303, 1307-09 (Ct. Int’l Trade 2002). There the court sustained the Commission’s rejection of a rebuttal comment as untimely. It did so because the comment was filed out of time and contained new information. This scarcely bears on this case since it is not concerned either with final comments for which a deadline has been set or with material that was part of a final comment. Perhaps the only potentially relevant part of this opinion is to be found in footnote 5, where the court, citing 19 U.S.C. § 1677m(g), speaks of the Commission as having “discretion to set a reasonable time frame for gathering information”. Where no specific time is specified, this may suggest that the Commission has a discretion over the timeliness of new information. However, it must not exercise any such discretion arbitrarily.

<sup>43</sup> See Domestic Industry Brief at 32.

<sup>44</sup> See Commission Brief at 40; Domestic Industry Brief at 40.

Furthermore, in the light of the remand on the issue of the Commission's refusal to expand the investigation to cover the second quarter of 2002, at least one of those justifications (that of relevance) might in any event be undercut by the Commission's conclusions on the remand. We therefore remand for further consideration by the Commission its rejection of the information filed by Ivaco on September 24, 2002.

#### **D. Other Issues Raised in the Complaint**

##### **1. Cumulation**

Ivaco raised the issue of cumulation in its complaint, alleging that the ITC erroneously cumulated imports from Canada with those from Brazil, Indonesia, Mexico, Moldova, Ukraine, and Trinidad and Tobago. This issue was not pursued in Ivaco's brief, nor were responses filed by the Commission and the domestic industry. Under Rule 58 of the *North American Free Trade Agreement Rules of Procedure for Article 1904 Binational Panel Reviews*, (*Panel Rules*) participants who fail to file briefs may be dismissed by an order of the Panel.

Rule 58 states, in pertinent part:

(2) Where no brief is filed by any complainant..., and no motion pursuant to rule 20 is pending, the panel may, on its own motion, ...issue an order to show cause why the panel review should not be dismissed.

Rule 2 of the Panel Rules states: "Where a procedural question arises that is not covered by these rules, a Panel may adopt the procedure to be followed in the particular case before it by analogy to these rules." On the basis of these rules, the Panel orders Ivaco to show cause why this issue should not be dismissed from the Panel review. If no filing is made within ten (10) days of the issuance by the NAFTA Secretariat of this decision, then the issue will be dismissed.

## **2. Volume, Price and Impact Claims**

Ivaco claimed in its complaint that the ITC erroneously found that (i) the volume of imports and the increase in that volume, and (ii) price underselling were “significant”; the ITC erroneously determined that cumulated subject imports “had significant price suppressing effects”; and the ITC erroneously found that the “subject imports are having a significant adverse impact on the domestic industry.” These are important substantive issues that merit thoughtful and careful review. However, in light of the data questions that the Commission must address on remand, it is premature for the Panel to decide these issues until after the filing of the determination on remand.

### **E. Remand Order**

For the reasons provided in the analysis above, the Panel hereby remands this determination to the Commission for further actions as follows:

1. The Panel finds that the Commission’s failure to state its position on the Q2 2002 data collection in the course of its decision making was arbitrary and capricious and not in accordance with law. The Panel remands this issue to the Commission for it to provide its reasoning as to why it did not collect second quarter 2002 data, as requested by the complainant.
2. The Panel finds that the Commission’s failure to address all of Ivaco’s arguments that rebut the legal presumption that changes in each of subject import volumes, price effects and impact were related to the pendency of the investigation was not in accordance with law. The Panel remands this issue to the Commission to review all of the evidence on the record and provide a reasoned decision that addresses all of the arguments and issues raised by Ivaco.
3. The Panel remands for further explanation the Commission’s decision to reject the information filed by Ivaco on September 24, 2002.

4. The Commission is hereby ORDERED to return a determination on remand within 60 days of the issuance of this order.

Date of Issuance August 12, 2004

Signed in the original by:

James R. Holbein  
James R. Holbein, Chairman

Serge Anissimoff  
Serge Anissimoff

Kevin C. Kennedy  
Kevin C. Kennedy

David J. Mullan  
David J. Mullan

Robert E. Ruggeri  
Robert E. Ruggeri